*To Be Argued By*
Jeffrey S. Baker

*New York County Clerk's Index No. 100686/06*

# New York Supreme Court

APPELLATE DIVISION – FIRST DEPARTMENT

DEVELOP DON'T DESTROY BROOKLYN; DANIEL GOLDSTEIN; ATLANTIC AVENUE BETTERMENT ASSOCIATION; FORT GREEN ASSOCIATION; BOERUM HILL ASSOCIATION; FIFTH AVENUE COMMITTEE; EAST PACIFIC BLOCK ASSOCIATION; PROSPECT HEIGHTS ACTION COALITION by its President Patti Hagan; PRATT AREA COMMUNITY COUNCIL; SOCIETY FOR CLINTON HILL; DEAN STREET BLOCK ASSOCIATION (4TH TO 5TH Ave.) by its President Judy Sackoff; PROSPECT HEIGHTS NEIGHBORHOOD DEVELOPMENT COUNCIL; ELISELLE ANDERSON; DAVID SHEETS; KEN DIAMONSTONE; and PACIFIC CARLTON DEVELOPMENT CORP.,

*Petitioners-Respondents-Appellants,*

*against*

EMPIRE STATE DEVELOPMENT CORPORATION,

*Respondent-Appellant,*

*and*

FOREST CITY RATNER COMPANIES,

*Respondent*

## REPLY BRIEF FOR PETITIONER-RESPONDENTS' CROSS-APPELLANTS

YOUNG, SOMMER, WARD, RITZENBERG,
BAKER & MOORE, LLC
Executive Woods
5 Palisades Drive
Albany, New York 12205
(518) 438-9907

*Attorneys for Petitioner-Respondent*

*Of Counsel*
Jeffrey S. Baker

# TABLE OF CONTENTS

# TABLE OF AUTHORITIES

**CASES**



**REGULATIONS**

## Preliminary Statement

Petitioners submit this Reply Brief in support of their cross-appeal of the decision by Justice Edmead which dismissed that portion of the petition which sought to annul the Emergency Declaration by Empire State Development Corporation (ESDC) that five buildings owned or controlled by Respondent Forest City Ratner Companies (FCRC) constituted an imminent threat to public health and safety. The Cross - Appeal also supports the permanent injunction against FCRC from demolishing the buildings during the SEQRA process provided the Court annuls the emergency declaration.

Petitioners recognize that the scope of this reply brief is limited to the issues raised in the cross-appeal, the rationality of ESDC's determination. Therefore, this brief does not respond to the arguments associated with Respondent's appeal of the disqualification of Sive, Paget & Riesel, P.C. as ESDC's counsel. However, the conflict of interest of Mr. Paget is relevant to the cross-appeal as it is evident from Respondents' statements in their latest briefs that the important reports prepared by LZA prior to November 2005, where never submitted to ESDC, despite Mr. Paget's knowledge of the reports. FCRC even admitted in their reply brief that they did not have access to these earlier reports. (Reply Brief FCRC,

25). Therefore the "severe and crippling" conflict of interest presented by Mr. Paget serving as counsel to ESDC is brought to stark relief in the manipulation of the record and the information provided to ESDC in the course of reaching its determination.

## ARGUMENT
## ESDC'S LACK OF ANY INQUIRY INTO FCRC'S CLAIMS WAS IRRATIONAL

Respondents would have this Court adopt an interpretation of the rational basis standard that would reduce judicial review to a level equivalent to a rubber stamp. As posited by Respondents, provided an agency had some support for a position, it would be ratified, regardless of the extent of contradictory information available to the agency. Such a constrained interpretation makes judicial review meaningless. It is incumbent upon this Court to consider the information available in the "record," to the extent it has been produced, and determine if it provides a rational basis. In this case, ESDC made no critical inquiry into the claim. It apparently failed to ask any questions regarding the options facing the developer and did not inspect the buildings. And its attorney, who had previously represented the developer, failed to inform ESDC that other reports had been prepared for the buildings and did not object when FCRC failed to inform ESDC

about those reports. Viewed in its entirety, ESDC's emergency declaration was simply a cover for private demolition in a project undergoing environmental review.

None of the cases relied upon by Respondents supports such a passive role by the judiciary. The cases considering the emergency action exemption under SEQRA all considered public emergencies where a public agency was the actor dealing with a public threat. Both Bd. of Visitors-Marcy Psychiatric Ctr. v. Coughlin, 60 N.Y.2d 14, 466 N.Y.S. 2d 668 (1983) and Silver v. Koch, 137 A.D.2d 467, 525 N.Y.S.2d 186 (1st Dept), *app. dismissed.*, 71 N.Y.2d 889, *app. denied* 73 N.Y. 2d 702, involved the providing of emergency housing for prison inmates. In those cases, either the State or New York City were faced with critical prison overcrowding issues and court orders directing immediate action. The courts recognized that overcrowding could lead to riots. See Bd. Of Visitors-Marcy, 60 N.Y. 2d at 17; Koch, 137 A.D. 2d at 469-70. The courts further recognized that the actions being taken - the conversion of vacant buildings at a State Psychiatric Center (Bd. of Visitors-Marcy) and the docking of a prison barge (Silver v. Koch) - did not irrevocably change the local environment or commit to a permanent action. Bd. Of Visitors-Marcy, 60 N.Y.2d at 21.

Greenpoint Renaissance Enter. Corp. v. City of New York, 137 A.D.2d 597,

524 N.Y.S.2d 488 (2d Dept. 1988) dealt with the emergency need of sheltering the homeless and the conversion of wings of a hospital to shelter housing. Emergency homeless shelters were also at issue in Midtown South Preservation and Dev. Comm. v. City of New York, 130 A.D.2d 385, 515 N.Y.S.2d 248 (1st Dept. 1987) and Greentree at Murray Hill Condo. v. Good Shepard Episcopal Church, 146 Misc.2d 500, 550 N.Y.S.2d 981 (Sup. Ct. N.Y. Co. 1989).

In New York State Thruway Authority v. Dufel, 129 A.D.2d 44, 516 N.Y.S.2d 981 (3d Dept. 1987), a Thruway bridge over the Schoharie River collapsed and the State had to take farmland for an emergency detour for the 7,500 additional vehicles per day added to the local rural roads, while a new bridge was built.

All of the foregoing represent *public* emergencies. Fundamental issues of public policy such as prison space, homeless housing and critical infrastructure. The issues were obvious and there were no questions of a private benefit being achieved at the expense of an environmental review. Furthermore, none of the cases involved an irrevocable change in the environment. They concerned the renovation of buildings, docking of a barge, or the temporary construction of a road over farmland that would be restored.

FCRC's plans to demolish buildings while seeking approval of Atlantic

Yards is materially different. There is no overriding public policy or interest causing the emergency. The emergency is the deterioration of the subject buildings and the threat their potential collapse poses to the public. That deterioration was caused, at least in part, by FCRC which acquired the properties with knowledge of their condition and failed to take measures to secure the buildings and prevent further deterioration.

Where it is a private party seeking the exemption from SEQRA as an emergency, the agency which makes that determination must be rational in its determination. The agencies in Marcy Psychiatric Ctr. v. Coughlin, Silver v. Koch, Greenpoint, and Thruway Authority all considered the relevant factors leading to the determination that an emergency existed which required the specific action. In this case, ESDC consciously avoided any meaningful inquiry.

It is admitted that ESDC did not inspect the buildings and did not undertake any engineering review of either the LZA report or the buildings. Ms. Shatz does not even say she viewed the buildings - just that she walked through the neighborhood and saw deteriorating buildings.

On the other hand, there is no question that LZA had prepared previous reports on each of the buildings which provide a context of the historical condition of the buildings and options for their stabilization. There is no question that Sive

Paget & Riesel had reviewed the reports (R. 516-17, ¶10-14). However, Mr. Paget did not inform ESDC about their existence or discuss their contents. Mr. Paget was one of the prime individuals that Ms. Shatz conferred with. He was present at the November presentation by LZA (R. 517-18 ¶ 14-17). Nevertheless he did not disclose to ESDC his knowledge of the reports. By failing to inform ESDC, he breached his duty to ESDC while facilitating the goal of his other client, FCRC, to obtain ESDC's concurrence in the demolition of the buildings.

FCRC's and ESDC's claims that Ms. Shatz recognized that stabilization of the buildings would be "pointless and wasteful" are unsupported by the record and contrary to the legal requirement under SEQRA (R. 295 ¶ 20). While Ms. Shatz's affirmation makes the statement that she believed it would be pointless and wasteful, there is no evidence in the record that she made any relevant inquiry in that regard prior to issuing the determination. Id. How could it be determined that stabilization would be pointless and wasteful if there was no information on the relative costs? Ms. Shatz did not inquire about alternatives. She did not inquire as to the means and costs of stabilization and it does not appear that she compared the costs of demolition to the costs of stabilization.[1] Certainly she did not have the

[1]It is known that FCRC has committed at least $1 3 million for the demolition of the buildings not including the asbestos abatement costs (R. 666) There was no assessment of how that amount compared to stabilization costs

benefit of the earlier reports from LZA which may have provided that information.

Respondents contend that Petitioners are only speculating about what is in the earlier LZA reports and offer no evidence to support the speculation. (FCRC Reply Brief at 25; ESDC Reply Brief at 30). That is of course an absurd contention. Since FCRC has not submitted the reports to the court, and has never shared it with ESDC, how are Petitioners to offer evidence of its contents? There is no question that the reports exist. They are alluded to in LZA's November report. There are references in the affidavits supplied by FCRC. If they are consistent with the November LZA report presumably FCRC would be pleased to supply them as further proof of the emergency state of the buildings. The fact that they have not been submitted supports Petitioners' inference that they discuss means of stabilizing the buildings and provide additional information on their overall condition. The simple facts remain that 1) those reports should have been part of the record before ESDC; 2) if ESDC had exercised minimal diligence in reading the November LZA report it would have been aware of their existence and requested their production; 3) FCRC consciously failed to provide them to ESDC; and 4) Mr. Paget breached his duty to ESDC by not informing them of the existence of the reports.

The SEQRA regulations exempt:

> emergency actions that are immediately necessary on a limited and temporary basis for the protection or preservation of life, health, property or natural resources, *provided that such actions are directly related to the emergency and are performed to cause the least change or disturbance, practicable under the circumstances, to the environment*. Any decision to fund, approve or directly undertake other activities after the emergency has expired is fully subject to the review procedures of this Part.

6 NYCRR § 617.5(c)(33) [Emphasis added]

Thus in determining the extent of the emergency and the action to be taken there must be consideration that the action is directly related to the emergency and the actions taken are performed to cause the least change or disturbance to the environment. Here the emergency is supposedly the state of the buildings and the threat caused to public health and safety. The action is to protect the public. The environment that should suffer the least change is the neighborhood where the buildings are located and the change in the community character that will result by demolition of buildings, the creation of unseemly vacant lots, and the elimination of the potential that some or all of the buildings can be renovated and restored as buildings that contribute to and are consistent with the neighborhood.

ESDC completely failed to consider those elements of its legal obligations in determining the emergency. ESDC failed to recognize its SEQRA obligations

to preserve the environment, and simply permitted the demolition to go forward without any inquiry as to whether the demolition was the only means of dealing with the threat without altering the fabric of the community while the SEQRA review for the project was still underway.

In point II of FCRC's reply brief, they state that even if the emergency declaration were to be invalidated, that it would still be improper to issue an injunction preventing demolition. (FCRC Reply Brief 30-38). This reasoning is not applicable to the present case because petitioners are attempting to invalidate the emergency declaration under SEQRA rather than seek injunctive relief. The petitioners are seeking to adjudicate the issue of the validity of the emergency declaration on the merits under SEQRA, rather than seek injunctive relief as FCRC suggests.

FCRC argues in its reply brief that the demolition was not an "action" under SEQRA (FCRC Reply Brief at 30-33). However, this argument cannot be raised for the first time on appeal, as the respondents never appealed this determination previously. Therefore, any argument asserting that the demolition was not an "action" under SEQRA cannot be reviewed through this appeal.

## CONCLUSION

For the foregoing reasons, the Court should reverse the lower court's order and annul the emergency declaration issued by ESDC and enjoin the demolition of the subject buildings.

Albany, New York
March 10, 2006

Respectfully submitted,

By _____
Jeffrey S. Baker

YOUNG, SOMMER, WARD,
RITZENBERG, BAKER & MOORE, LLC
*Attorneys for Petitioners-Respondents-Cross-Appellants*
5 Palisades Drive
Albany, NY 12205
(518) 438-9907

**Printing Specifications Statement**

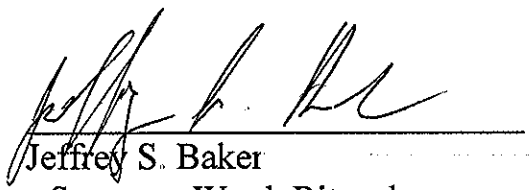
Pursuant to 22 NYCRR _ 600.10 (d) (iv) the foregoing brief was prepared on a computer.

*Type*: A proportionally spaced typeface was used as follows:

Name of typeface: Times New Roman
Point Size: 14
Line spacing: Double

*Word Count*: The total number of words in the brief, inclusive of point headings and footnotes and exclusive of pages containing the table of contents, table of authorities, proof of service, certificate of compliance, or any authorized addendum containing statutes, rules, regulations, etc. is 2,055.

Dated: Albany, New York
March 10, 2006

By: 

Jeffrey S. Baker
Young, Sommer, Ward, Ritzenberg,
Baker & Moore, LLC
Executive Woods
5 Palisades Drive
Albany, New York 12205
(518) 438-9907

*Attorneys for Petitioners-Respondents-Cross-Appellants*